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No. 10-911

Supreme Court
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IN THE

Supreme Court of the United States

VERIZON'S BELL ATLANTIC CASH BALANCE PLAN, and VERIZON COMMUNICATIONS, INC.,

Cross-Petitioners,

v.

CYNTHIA YOUNG, individually and on behalf of all others similarly situated,

Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF CROSS-PETITIONERS

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CROSS-PETITIONERS' REPLY BRIEF

Verizon filed its conditional cross-petition for only one reason: to ensure that, in the unlikely event that the Court were to grant the petition, the Court would be in a position to consider all potential remedial options for addressing a scrivener's error in an ERISA plan document. Cross-respondents respond that the issue raised in the cross-petition is not independently certworthy. Verizon agrees. No issue raised in the petition or the conditional cross-petition merits this Court's review. True scrivener's errors are exceedingly rare and there is no meaningful split in the courts of appeals. But if this Court were to address the subject, there would be no reason for the Court to be artificially constrained in considering the various remedial options, including the possibility that a plan administrator could interpret a plan document to avoid the absurdities produced by the scrivener's error in much the same way that courts interpret statutes to eliminate such absurdities.

1. The brief in opposition accuses Verizon of "two serious misstatements of fact." Br. in Opp. 1-2. There were no misstatements. It is undisputed, as the conditional cross-petition stated, that the duplicative reference to a transition factor was a scrivener's error. Cross-Pet. 2. Cross-respondents do not dispute as a factual matter that the duplicative reference was an error and that the error was made by the scrivener. The Seventh Circuit aptly described the problem as "[b]otched reformatting," Pet. App. 20a, or "a drafting mistake," as cross-respondents acknowledged in their Seventh Circuit brief. Cross-Resp. 7th Cir. Br. 5.

Cross-respondents contend, however, that the legal doctrine of scrivener's errors requires that the mistake be mutual, and the mistaken reformatting here was a unilateral error. Br. in Opp. 2. It is not at all clear that the legal question depends on a mutual mistake. Scrivener's errors in the statutory context are recognized as such despite their unilateral character. Here, however, the district court found a mutual mistake in the relevant sense: "both the plan sponsor and the plan beneficiaries were operating under the same understanding of the sponsor's intent." Pet. App. 119a-20a. The district court found "by objective clear and convincing evidence that both parties operated under the understanding that [the transition factor] would only be multiplied once." Pet. App. 126a. The evidence included "more than 50,000 separate mailings" to participants, "each of which," the district court found, made clear the intended formula. Pet. App. 128a. The Seventh Circuit affirmed the district court's finding that, under the clear-and-convincing evidence standard, the duplicative reference was "a scrivener's error inconsistent with the plan participants' expected benefits" and reformation was therefore appropriate. Pet. App. 22a-23a.

Cross-respondents also claim that Verizon made a "serious misstatement of fact" by stating that Bell Atlantic had changed the plan formula seven months before it adopted the formal plan document in July 1996. Br. in Opp. 1. This argument is a straw man. There can be no dispute as to the sequence of events: the erroneous plan provision was adopted "after the fact," that is, after the intended formula had been communicated to employees in 50,000 separate

mailings and had been used to calculate the actual opening balances for all participants in accordance with the amendment approved by the Human Resources Committee of the Bell Atlantic Board of Directors, which called for multiplying by the transition factor only once, not twice. Pet. App. 46a-73a.

"The implication" to be drawn from Verizon's reliance on this sequence, according to cross-respondents, is that the plan document is "a mere formality." Br. in Opp. 1. Verizon never said that. Rather, the sequence is additional evidence that the duplicative reference in the formal plan text was "a scrivener's error inconsistent with the plan participants' expected benefits."[1] Pet. App. 22a.

2. On the merits, the brief in opposition frankly acknowledges that cross-respondents seek to impose a "strict liability" standard for errors in ERISA plans, under which there would *never* be a remedy for a scrivener's error—no matter how clear it is that the error was inconsistent with everyone's understanding of the sponsor's intent, and no matter how devastating the consequences. Br. in Opp. 12. That position has no basis in ERISA or common sense.

As this Court recently emphasized, "[p]eople make mistakes," especially when dealing with

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[1] Contrary to cross-respondents' assertion, the district court did not hold that the formula was, as a matter of law, "not changed" until the plan document was finalized. Br. in Opp. 1-2.

"lengthy and complicated" ERISA plans. *Conkright v. Frommert*, 130 S. Ct. 1640, 1644 (2010). A strict liability standard would not eliminate those mistakes. True scrivener's errors are already rare, in part because plan administrators have plenty of incentives to try to avoid them—no one would choose to incur the costs and risks of litigation under the strict standards of the scrivener's error doctrine.

While a strict liability standard would not reduce true scrivener's errors, it would "unduly discourage employers from offering ERISA plans in the first place," contrary to Congress's intent. *Conkright*, 130 S. Ct. at 1649 (internal quotation marks omitted). Employees' justified expectations can be protected, *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962, 1973 (2009), and plans can be soundly funded, 29 U.S.C. § 1001(c), only if plans have predictable financial consequences. Strict liability for drafting errors, however, would lead to wholly unforeseen liabilities that would "create an actuarial and funding nightmare" for plan sponsors. *See Bance v. Alaska Carpenters Ret. Plan*, 829 F.2d 820, 825 (9th Cir. 1987).

Cross-respondents argue that the plan administrator may only interpret ambiguous plan provisions, and may not rewrite plan documents to correct clear mistakes. That is a false dichotomy. Correcting a scrivener's error is an exercise in interpreting—not rewriting—a plan provision to effectuate the drafter's intent. Thus, as the Seventh Circuit noted, there is "little difference between the intent-based inquiry that took place in this reformation case and what must occur in the related

case of an ambiguous ERISA plan." Pet. App. 19a. Indeed, like both the district court and the Seventh Circuit, the administrator of the Verizon plan concluded that the duplicative reference in a plan document to the plan's transition factor was a mistake and that both Bell Atlantic and the participants expected only a single multiplication by the transition factor. Pet. App. 155a-59a.

In the analogous context of construing statutes, this Court has repeatedly recognized that when the "plain language" of congressional legislation would lead to "absurd or glaringly unjust results," courts should construe statutes to avoid those results. *United States v. Rodgers*, 466 U.S. 475, 484 (1984) (quoting *Sorrells v. United States*, 287 U.S. 435, 450 (1932)); *see also, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528-29 (1989) (Scalia, J., concurring in the judgment). Correcting scrivener's errors is an interpretive exercise that "does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch" by presuming, as a matter of interpretation, that the statute's drafters "would not act in an absurd way." *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring in the judgment). Construing provisions in this manner does not amount to "rewriting the statute"; it entails only "correcting a technical mistake" so as to vindicate a "meaning genuinely intended but inadequately expressed." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 82 (1994) (Scalia, J., dissenting). Because the scrivener's error doctrine in this context is a means of *interpreting* a

provision, it falls within plan administrators' interpretive powers.

3. Apart from arguing the merits, cross-respondents offer three reasons for denying the cross-petition. None has merit.

First, cross-respondents assert that Verizon did not raise this issue before the Seventh Circuit. Br. in Opp. 8. Cross-respondents are wrong. The district court ruled that the plan administrator abused its discretion by denying benefits based on its finding that the duplicative reference to the transition factor was a mistake. Pet. App. 188a. Verizon challenged that ruling in the Seventh Circuit by filing a cross appeal, just as it is now raising the same issue in this Court by filing a conditional cross-petition.

Cross-respondents nonetheless contend, in effect, that Verizon is now invoking a different *supporting argument*. Specifically, cross-respondents argue that Verizon relied below on the plan administrator's discretion to interpret an ambiguous plan provision, and is now arguing that the plan administrator may remedy an obvious scrivener's error. As explained above, there is no meaningful difference between those two ways of arguing the point. But even if there were, that difference in supporting *arguments* would be irrelevant. The *issue* here is whether the plan administrator abused its discretion by not enforcing the scrivener's error. Verizon clearly preserved that issue, and "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Harris*

Trust & Sav. Bank v. Salomon Smith Barney, Inc., 530 U.S. 238, 245 n.2 (2000) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Second, cross-respondents argue that the Fourth Circuit held in *Blackshear v. Reliance Standard Life*, 509 F.3d 634, 642-43 (4th Cir. 2007), that the authority to reform ERISA plans lies exclusively with the courts, not the plan administrator. That single lower court decision hardly bears on the certworthiness of the conditional cross-petition, and the decision is wrong for the reasons explained above.

Third, cross-respondents contend that there is no circuit split on the issue raised by the cross-petition. As noted above, Verizon agrees that none of the issues presented here is independently certworthy; that is why it filed a *conditional* cross-petition for the sole purpose of removing any procedural obstacle to the Court's consideration of the role of the plan administrator with respect to scrivener's errors in the unlikely event the Court grants the petition. Nonetheless, scrivener's errors are rare, cases addressing them are rarer still, and there is no square circuit split that could warrant review of either the petition or the conditional cross-petition.

CONCLUSION

Review of the Seventh Circuit's decision is not warranted. But if the Court were to grant the petition in No. 10-765, it should also grant the conditional cross-petition so that the Court would face no procedural impediment to considering all of

the remedies for correcting a scrivener's error in an ERISA plan document.

Respectfully submitted,

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